

BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES AND ENERGY  
IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE BOARD )  
ORDER TO SHOW CAUSE RE: )  
POTENTIAL PATTERN OF )  
VIOLATIONS, INCLUDING NOTICES )  
OF VIOLATION N91-35-1-1 AND )  
N91-26-7-2 (#2), CO-OP MINING )  
COMPANY, BEAR CANYON MINE, )  
ACT/015/025, EMERY COUNTY, UTAH. )  
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DOCKET NO. 92-041

CAUSE NO. ACT/015/025

ON WEDNESDAY, FEBRUARY 24, 1993, COMMENCING AT THE  
HOUR OF 10:00 A.M., A HEARING WAS HELD IN THE ABOVE MATTER  
BEFORE THE BOARD OF OIL, GAS AND MINING, 355 WEST NORTH  
TEMPLE, 3 TRIAD CENTER, SUITE 520, SALT LAKE CITY, UTAH  
84180-1203.

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LINDA J. SMURTHWAITE, CSR, RPR <sup>263-1396</sup>

ORIGINAL

1 APPEARANCES

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3 CHAIRMAN: JAMES W. CARTER

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6 BOARD MEMBERS: RAYMOND MURRAY  
7 JUDY F. LEVER  
8 DAVE D. LAURISKI  
9 E. STEELE MCINTYRE  
10 JAY CHRISTENSEN  
11 KENT STRINGHAM

12

13 STAFF MEMBERS:  
14 JANICE L. BROWN, Secretary of the Board  
15 LYNDIA S. JENSON, Secretary  
16 THOMAS A. MITCHELL, Assistant Attorney General  
17 RONALD J. FIRTH, Associate Director of Land Gas,  
18 Division of Oil, Gas and Mining  
19 LOWELL P. BRAXTON, Associate Director of Mining,  
20 Division of Oil, Gas and Mining  
21 FRANK R. MATTHEWS, Petroleum Engineer  
22 BRAD G. HILL, Geologist

23

24 BUREAU OF LAND MANAGEMENT:  
25 ASSAD N. RAFFOUL, Petroleum Engineer

FOR CO-OP: CARL KINGSTON, ESQ.  
MARK HANSEN, ESQ.

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1 SALT LAKE CITY, UTAH, FEBRUARY 24, 1993

2 MR. CARTER: Item number four. Now is the time and  
3 place for hearing in Docket Number 92-041, ACT/015/025  
4 In the Matter of the Board Order to Show Cause Re:  
5 Potential Pattern of Violations Including Notices of  
6 Violation N91-35-1-1, and N91-26-7-2, Part 2, Co-op  
7 Mining Company, Bear Canyon Mine, ACT/015/025, Emery  
8 County, Utah. And this matter is being continued from  
9 the Board's January hearing and I would note for the  
10 record that the Board conducted -- we had an interim  
11 hearing at which Mr. Lauriski and I were acting as  
12 hearing examiners on behalf of the Board to consider the  
13 limited issue of whether or not the facts underlying the  
14 notices of violation which are at issue here could be  
15 brought or could be challenged or made issues in the  
16 notices, or excuse me, in the pattern of violations  
17 hearing. And the determination of the Board in a  
18 nutshell was that respondent here is collaterally  
19 estopped from raising the issues or issues of mitigation  
20 relating to those notices of violation, and that the  
21 pattern of violations proceeding will be based upon  
22 those notices of violation as they stand.

23 And understand this is not an attempt to get the  
24 notices set aside. But the Board also knew that the  
25 issue ruled that the issues giving rise to those notices

1 of violation would also be not appropriate for discovery  
2 or further testimony in conjunction with the pattern of  
3 violations hearing. So, having said that, Mr. Carl  
4 Kingston is hear appearing for Co-op F.

5 MR. KINGSTON: If I may as a matter to clarify  
6 matters of the Board, I'd like to take this opportunity  
7 to introduce to you Mr. Mark Hansen who is associate  
8 counsel of mine, co-counsel in this case. He'll be  
9 conducting the hearing on behalf of Co-op Mining  
10 Company.

11 Just as a preliminary matter to lay the groundwork,  
12 so that we're all on the same wave length, my  
13 understanding is that Co-op Mining Company was ordered  
14 by the Board to appear before it at, I believe, the  
15 October hearing, to show cause why the mining permit  
16 should not be suspended because of a potential pattern  
17 of violation which was found by the then Division  
18 Director.

19 Co-op Mining Company did appear at that hearing, the  
20 Division presented its evidence. When we attempted to  
21 present our evidence, regarding specifically the issues  
22 of negligence, objections were raised and the Division  
23 continued that hearing so that the Division could  
24 consider the arguments, and asked the parties to brief  
25 the matter which was done. And then as you indicated

1 Mr. Chairman, another hearing was held, and the Board  
2 did decide by its order that Co-op Mining Company was  
3 collaterally estopped from introducing any evidence  
4 regarding the underlying findings of those two NOV's  
5 which allegedly make up a pattern of violations.

6 We feel we are at a disadvantage of that order but  
7 we'll comply with that order. So, we will try to  
8 restrict the testimony and the evidence which is going  
9 to be presented to the Board today to the other issues  
10 that remain regarding the pattern of violations, and  
11 there may be some overlap, but the intent, if there  
12 appears to be an overlap, is not with regard to the  
13 negligence, but an attempt to show the Board there was  
14 not a pattern of violation which is existed.

15 With that, why I'll turn the time over to Mr. Mark  
16 Hansen.

17 MR. CARTER: All right. And Mr. Mitchell, I believe  
18 that that's the state of the proceedings, that we  
19 essentially took time out to settle the issue with  
20 regard to the evidence on the underlying NOV's but that  
21 Co-op is now in the process of presenting its response  
22 case in chief, if you will, to the Division's case.

23 MR. MITCHELL: That's right.

24 MR. CARTER: Mr. Hansen.

25 MR. HANSEN: Thank you, Mr. Chairman. I'd like to

1 get some clarification for myself as to what your  
2 understanding of the extent that order was, because what  
3 you just said doesn't appear to me to comport to the  
4 order itself. What this order, dated February 4th,  
5 1993, states, a single order, that Co-op is collaterally  
6 estopped from introducing evidence as to the degree of  
7 fault giving rise to NOV N91-35-1-1 and NOV N91-26-7-2  
8 number 2, as a pattern of violations presently before  
9 the Board. Was it your intent that the order go beyond  
10 the language contained in the written order?

11 MR. CARTER: No. I believe that's a complete order  
12 and full order of the Board.

13 MR. HANSEN: My understanding then is the only thing  
14 that Co-op is collaterally estopped from introducing  
15 evidence to, is evidence as to the degree of fault  
16 giving rise to those two violations?

17 MR. CARTER: Correct.

18 MR. HANSEN: And evidence --

19 MR. CARTER: Just one minute.

20 (Whereupon a discussion was held off the record.)

21 MR. CARTER: Well, that is a good point Mr. Lauriski  
22 just brought up. The issue is not squarely raised, I  
23 suppose, of whether or not Co-op could attack the  
24 NOV's. But certainly there was argument on the part of  
25 the State that the NOV's themselves have appealable

1 orders, which if had not been appealed, were final  
2 orders. And so that other aspects of the NOV's were  
3 settled as a matter of law. The focus of the issue, and  
4 I guess the reason for the language of the Board was,  
5 whether or not presented with an order to show cause why  
6 the permit shouldn't be revoked, whether or not Co-op  
7 would be able to introduce evidence which tended to  
8 mitigate the seriousness of the NOV's, and that, to the  
9 Board at that time, seemed to be a unique question, and  
10 not one that was clearly answered.

11 I think, if I understood both parties, and maybe we  
12 have to look at the record to make sure, but I  
13 understood both parties, counsel for both parties to  
14 agree, that whether or not the NOVs were properly issued  
15 or whether or not the NOVs were valid acts of the  
16 Division or beyond appeal, or beyond the purview of the  
17 Board or this inquiry. And that the real debate was  
18 whether or not the facts underlying the NOVs were  
19 legitimate areas of inquiry and the determination of the  
20 Board was, they're not.

21 MR. HANSEN: Well --

22 MR. CARTER: Explain to me where we're headed.

23 MR. HANSEN: It's not Co-op's intent to attack, at  
24 this stage at least, the validity of the NOVs  
25 themselves, but it is our position that all of those

1 underlying facts are relevant to show that those NOVs  
2 were isolated departures from lawful conduct, and that  
3 as evidence that they do not constitute a pattern. You  
4 have to look at what actually happened that gave rise to  
5 those NOVs to determine whether or not a pattern is  
6 established by those NOVs.

7 MR. CARTER: This is -- let me try something and  
8 I'll get Mr. Mitchell to respond to this. My sense was,  
9 after the Board deliberated and entered the order that  
10 we have in front of us now with regard to collateral  
11 estoppel issues, my sense was, issues relating to  
12 Co-op's behavior since that time, issues relating to  
13 other not mitigating factors relating to the NOVs, but  
14 good deeds during that period of time, were legitimate  
15 areas of inquiry for the Board to determine the  
16 seriousness of the pattern of violation.

17 But I'll be frank with you in saying, that if the  
18 determinations of culpability, if you will, under the  
19 NOVs are settled, then the issue of whether or not there  
20 is a pattern of violation just by a statutory  
21 construction of the law, is not a very large issue,  
22 unless the other aspects of the pattern of violations --  
23 that the period in question was other than I think three  
24 years is the statutory period. I mean those other  
25 elements of the pattern of violation. And that my sense



1 was the main inquiry of this hearing would be in  
2 relation to mitigation.

3 That is, that if this were a pattern of violation,  
4 is not a serious pattern of violation because of these  
5 other circumstances that the Board should take into  
6 consideration in looking at the big picture, which is  
7 Co-op's entire history in the area. Now, I don't know  
8 what else to say. But --

9 MR. HANSEN: One thing that is not clear in my mind,  
10 is how the Division is applying the Board's own  
11 regulation to resolution of this matter. Regulation  
12 3.32.300 requires the director to rely on violations  
13 found during three or more state inspections of the  
14 permit areas during a -- within a 12 month period. If  
15 that's the provision that the Division is relying on, we  
16 would submit there has not been a prima facia case made  
17 for the simple reason there are only two violations  
18 relied on at this time. So if the Division is relying  
19 on that provision of the regulations, they have not made  
20 their prima facia case clearly.

21 Instead they are relying on section 332.100. One of  
22 the things that has to be shown, is the extent to which  
23 the violations were isolated departures from lawful  
24 conduct, and if these two violations theoretically could  
25 be found to be a pattern of violations, that at a

1 minimum it has to be shown they were not isolated  
2 departures from lawful conduct, and what actually  
3 happened, the underlying facts gave rise to those  
4 violations is relevant to establish whether or not those  
5 violations were isolated departures from lawful conduct.

6 MR. CARTER: I would think, and I don't want to get  
7 into an argument, maybe we're splitting hairs. But the  
8 terminology "isolated departure" is not as to the  
9 substance of the events, but the event's relationship to  
10 other events, or the fact that that event, that there  
11 are no other similar events, that it is in fact an  
12 isolated departure from an otherwise unlawful conduct.  
13 Here's the record. The only two -- the only evidence to  
14 that effect would suggest to me that that goes to  
15 demonstrate that that's an isolated circumstance.

16 MR. HANSEN: Well, and in argument -- I'm going make  
17 the argument that one of the arguments will be made that  
18 the Division has not made its prima facia case and there  
19 is no violation. Of course if you are going to rule in  
20 our favor we can be done and walk out of here.

21 MR. CARTER: Let Mr. Mitchell respond.

22 MR. MITCHELL: Okay. I think I can cut through  
23 this. The Board in its memorandum opinion of February  
24 4th of this year, under the heading Pattern of  
25 Violations Process, cites Utah Rule 645-400-332-300, and

1 in deed that requires that there have been three or four  
2 state inspections of the permit area within the 12 month  
3 period. And if my understanding is correct, he's saying  
4 that evidence was not presented in the hearing that  
5 there were three or more inspections of the Co-op  
6 facility, Bear Canyon Mine during a 12 month period.

7 Is that my understanding of your argument?

8 MR. HANSEN: My argument is that -- do we want to  
9 get in to the argument at this point?

10 MR. CARTER: That the state failed to demonstrate  
11 there were in fact --

12 MR. CHRISTENSEN: Question. One of you is talking  
13 about inspections and the other one violations.

14 MR. MITCHELL: Well, I'm trying to get at -- my  
15 point is more question clarification because I have no  
16 idea where we're going either. But to the extent, in  
17 other words, I would say the Board has already ruled  
18 what the pattern of violation process is. They have  
19 written the memorandum opinion on it which I think is  
20 relatively clear.

21 Now, as to whether or not there's a prima facia  
22 case, we'll hear about if they can rebut it or attack it  
23 effectively. There will be an opportunity for the  
24 Division on rebuttal to cure it if there's a problem  
25 there.

1 In terms of the bigger issue, which I think we're  
2 getting at, but I'm not sure where we're going still, I  
3 believe the issue in front of the Board is fairly  
4 narrow, and that is, taking in the big picture, what  
5 does the Board do with regard to the these two  
6 violations within the 12 month period? And I think the  
7 Chairman's right, I think it is relevant as to how the  
8 Board reacts to this or takes action on it, how it fits  
9 in the bigger context. But that the resolution of the  
10 facts of the NOV's that make this pattern up at this  
11 point, is essentially resolved. But they aren't in a  
12 context, and that they do have a right and it would be  
13 perfectly reasonable for them to put them in a context.

14 MR. CARTER: Let me try to rephrase it and see if I  
15 understand. The Division's position would be that the  
16 Division feels it has proven there were two violations,  
17 and I think it would be hard to rebut that there were  
18 two, and that there's -- those two violations took place  
19 within a 12 month period.

20 MR. MITCHELL: There were two more violations  
21 according to your opinion, two or more violations were  
22 issued within a 12 month period. The violations were  
23 issued as a result of a state inspection and three of  
24 the violations were of the same or related requirements  
25 of the State Program or permit; and that each violation

1 was caused by the permittee willfully or through  
2 unwarranted failure to comply.

3 The state rested in belief that -- we'll hear about  
4 what their opinion about that is -- that those four  
5 prima facia elements were established and in front of  
6 the Board.

7 MR. HANSEN: Mr. Mitchell, what are you reading  
8 from?

9 MR. MITCHELL: Page 7 of the Board's February 4th  
10 orders.

11 MS. LEVER: Is all of the text of 332 in that  
12 footnote, Mr. Mitchell?

13 MR. MITCHELL: I don't know, let me take a look.

14 MR. HANSEN: I can tell you in a second.

15 MR. CARTER: I'm sorry.

16 MR. HANSEN: There is an additional sentence to that  
17 provision. Just read after such review, the Director  
18 determines that a pattern of violation exists, the  
19 Director must recommend that the Board issue an Order to  
20 Show Cause as provided in Paragraph 645-400-331.

21 MS. LEVER: But whether or not that was followed  
22 isn't an issue, right?

23 MR. HANSEN: Well, if we were relying on 332-300, I  
24 would suggest that we should follow the language that's  
25 contained in that section, which says the Director will

1 promptly review the history of any violations of any  
2 permittee who has been cited for violations of the same  
3 or related requirements of the State Program, or the  
4 permit during three or four state inspections of the  
5 permit area within a 12 month period.

6 In other words, to rely on Section 332.300 you have  
7 to have violations under three or more inspections, not  
8 two inspections and only two have been shown here.

9 MR. CARTER: Aren't we splitting hairs? Two  
10 violations arising out of three inspections?

11 MR. CHRISTENSEN: That's right.

12 MR. CARTER: At least that was the way I read it,  
13 was there needed to be three or more inspections and the  
14 three inspections had to result in two or more  
15 violations. Not that there are two different things.

16 MR. HANSEN: I'm lost to see where you get this from  
17 the first point to the second point.

18 MR. CARTER: Well, if the state visits the property  
19 10 times during the year, that meets the minimum of  
20 three inspections. And if the state finds violations in  
21 the 10 inspections, the standard of finding two  
22 violations in the 12 month period, so the number of  
23 inspections and the number of violations don't need to  
24 be the same.

25 MR. HANSEN: I suppose, I'm at a loss to see where

1 we come to the point that the regulations allow finding  
2 of a pattern of violations is based on two violations.

3 MS. LEVER: It doesn't say three either.

4 MR. CARTER: Can you help us with that? Where do  
5 the regulations allow us to find violations based on two  
6 --

7 MS. LEVER: Violations plural.

8 MR. MITCHELL: Two or more violations occurs at --  
9 actually I think it's the statute. 40-10.

10 MR. CHRISTENSEN: Mr. Chairman, in an order signed  
11 by Dianne Nielson, 27 July, 1992, page 6, it says the  
12 director has reviewed the history of these three  
13 violations, and it puts out the numbers as required by  
14 the law.

15 MR. CARTER: And my recollection was that the  
16 director initially felt there were three violations, but  
17 determined one of the violations was not the result of  
18 an inspection.

19 MR. MITCHELL: And based upon those two, moved  
20 forward to the Board, for the Board to issue an Order to  
21 Show Cause.

22 MR. CARTER: Mr. Hansen's question is where does the  
23 two as the threshold number of violations occur, in the  
24 regulations or the statute.

25 MR. HANSEN: That's correct.

1 MR. LAURISKI: May I make a suggestion. Rather than  
2 for us to sit here and debate the Board's order of that,  
3 perhaps it's more appropriate that you present your  
4 arguments with respect to what constitutes a pattern of  
5 violation, and if the state failed administratively to  
6 find that Co-op established a pattern, perhaps for the  
7 state to rebut that argument if they can, as to why they  
8 in fact did administratively find Co-Op to be in a  
9 pattern of violation mode, otherwise we may be here  
10 arguing back and forth amongst the three parties for  
11 rest of the afternoon and perhaps tomorrow.

12 MR. HANSEN: I would be happy to begin that argument  
13 at this point if you'd like to. My one concern is we  
14 have Mr. Orens (sic) here up from the Co-op Mine, and  
15 he, if we are allowed to put on evidence, we'd like to  
16 give this evidence so he can good back down there  
17 today.

18 MR. LAURISKI: I think the focus of what you can  
19 present has to be very narrow. I don't believe, based  
20 upon the Board's order, it limits your discussion --  
21 precluded you from discussing the degree of negligence,  
22 whether it was willful. And I think it also precludes  
23 you from discussing the merits of the violation.

24 So perhaps what I'm hearing is that administratively  
25 did the Division conduct three inspections; did they



1 issue two violations; and if they did, if then they have  
2 met their burden. But if you can prove that they  
3 didn't, then they haven't met the burden of proof of  
4 pattern. But outside of the scope of those, the order  
5 was that Co-op was collaterally estopped from attacking  
6 the other issues relevant to the merits and the  
7 negligence of the violations themselves.

8 MR. CARTER: And I think what I hear counsel for the  
9 Division saying, is that the context in which those  
10 violations took place is relevant, and may be  
11 mitigating. That is, per your argument, perhaps you  
12 could demonstrate they were isolated departures from  
13 otherwise lawful conduct.

14 MR. HANSEN: The reason that we would like to go in  
15 to the underlying facts is just for that reason. I  
16 think it is necessary for the Board to understand the  
17 underlying facts separate and apart from the negligence  
18 issue which I understand we are precluded from going  
19 into at this point, but to understand whether or not  
20 these were isolated departures, and if so, the extent to  
21 which they were isolated requires an understanding of  
22 the underlying facts that go beyond the conclusory  
23 statement set forth in the NOV.

24 MR. LAURISKI: Are you talking about the underlying  
25 facts as they pertain to the merits of the violation?

1 MR. HANSEN: We are not disputing the fact that the  
2 violations were issued and the conclusiveness of those  
3 violations, but it's our position that for the Board to  
4 properly understand whether or not they were isolated  
5 departures, and if so the extent to which they were  
6 isolated departures, it is helpful to have an  
7 understanding of the underlying facts, which the Board  
8 does not have before them at this time.

9 MR. MITCHELL: I can just clarify, the relevant rule  
10 is R 645-400-332.100. And this refers to what the  
11 director does and it says the Director may determine  
12 that a pattern of violation exists or had existed based  
13 upon two or more Division inspections to the permit area  
14 within a 12 month period after considering the  
15 circumstances including, and then, quotes, but we're in  
16 to the director there.

17 MR. CARTER: Let me just throw something out here,  
18 and I'm -- this is difficult because it's a case of  
19 first impression, if you will, but my concept of this  
20 was the director makes the determination of guilt or  
21 innocence, and the Board's only job in this instance is  
22 to determine the appropriate penalty. So that what we  
23 have here, and I'm putting this crudely and I can be  
24 convinced I'm wrong, but that the only issue squarely  
25 before the Board is what's the appropriate remedy, and

1 to what extent.

2 UNIDENTIFIED SPEAKER: The Board is not a recourse?

3 MR. CARTER: I think the regulation, I mean that's  
4 the question. I think the regulation says the Division  
5 Director can determine whether or not there's a pattern  
6 of violations. Certainly you can attack whether or not  
7 the Division Director made a mistake, but given -- I  
8 mean it's a fairly mechanical determination. I think  
9 that's what the essence of our order was. We're not  
10 going to look at the facts underlying the violations or  
11 anything relating to the violations. All we will look  
12 at is whether or not there were two; they were in 12  
13 months; substantially similar; and then mitigating  
14 circumstances relating to were they isolated  
15 occurrences.

16 You know, what have you done since that time, and  
17 those kind of things. Mr. Kingston?

18 MR. KINGSTON: Not to steal Mr. Hansen's thunder,  
19 but one area of confusion here and obviously it's an  
20 area of contention because it is a case of first  
21 impression, is that the regulations state two  
22 inspections and I think the Division has taken the  
23 position, which in our opinion is unfounded, that two  
24 inspections equate to two violations. Now, it could be  
25 on one inspection they might find four or five

1 violations of a similar type, but nowhere, either in the  
2 regulations nor in the code, does two inspections equate  
3 to two violations.

4 MR. CARTER: Administrative law is supposed to be  
5 efficient and relatively easy to get administrative  
6 relief. It seems to me we are butting up against yet  
7 another legal determination, a statutory construction  
8 and regulatory construction issue that perhaps needs to  
9 be resolved before we proceed. I mean, I can't believe  
10 I'm saying this, but help me.

11 MS. LEVER: I'd like to ask this question. If my  
12 reading is -- I'd thought what your argument would be  
13 today based on -- and counsel's argument of what we  
14 would be hearing, is something to the effect of saying  
15 why the violations that were not challenged -- I mean,  
16 you can't now challenge, it shouldn't have been a  
17 violation. But that whatever acts that you were found  
18 guilty of violating, that there was more than one, and  
19 that they were of a similar related program, that you  
20 were just in violation of the act, period. But they  
21 were of a similar generic thing, like, in other words we  
22 told you you were gonna do one thing and you go ahead  
23 and did C, and you did it twice. And frankly, I think  
24 you'd be tagged if you had -- you know, that those to me  
25 would be similar violations of the act.

1           You can't go back, doesn't matter whether you --  
2 negligence isn't an issue. But on the other hand, going  
3 and saying you're gonna work here and working over  
4 there, is it not the same thing as failing to submit  
5 maps, or --

6           MR. CARTER: So the similarities of violations are  
7 an open issue.

8           MS. LEVER: The number of violations, other than  
9 they're plural, more than the number of inspections  
10 during the period of time is the issue. But whether or  
11 not they were related to create a pattern of showing --

12          MR. HANSEN: I would submit that is an important  
13 issue. As Mr. Carter pointed out, it's probably a legal  
14 issue, and I think it's a central and vital legal issue  
15 to this proceeding. I'm prepared to offer oral argument  
16 on how the statutes could be construed, but it may be  
17 you will want to have a memoranda even in the face of  
18 that, because I'm sure Mr. Mitchell is not prepared to  
19 argue how the statutory language is to be interpreted.

20          MR. MITCHELL: Let me go this far. I, in the first  
21 instance, would rely upon the Board's order of page 7  
22 which says, two or more violations were issued as a  
23 result of a state inspection; of the same or related  
24 requirements; and caused by willful or unwarranted  
25 failure to comply. I do believe that the statute is the

1 definitive statement on this, and I've looked at the  
2 statute a hundred times, and I am totally incapable of  
3 finding it anywhere in the statute as we sit here while  
4 I'm trying to do several other things.

5 MR. KINGSTON: It's not there.

6 MR. CARTER: Mr. Kingston says he doesn't believe  
7 it's there.

8 MR. MITCHELL: I'm beginning to wonder what I was  
9 thinking of, but it's certainly a novel approach to  
10 this. It's certainly the first time I've heard the  
11 arguments stated this way. I'm still trying to digest  
12 fully what the argument is. And I would like, if the  
13 Board believes that the matter is not resolved by its  
14 previous order, and I guess I would take the position  
15 the previous order does resolve the matter for this  
16 purpose, then obviously I would like the time to respond  
17 to it.

18 MR. CARTER: I think what I'd like to do is get this  
19 into a framework that the Board can deal with and  
20 understand it. And it would be productive for counsel  
21 to both parties to attempt to determine what it is they  
22 agree or don't agree to, and frame their issues and come  
23 to an agreement, I guess, as to how to frame the issue,  
24 So that we can determine whether we've got the necessary  
25 testimony or whether we need additional briefing or

1 whether we're prepared to take argument and make a  
2 determination.

3 I mean, if we need to do statutory construction  
4 first and rule construction next, and then we need to  
5 take testimony and argument, maybe that's what we have  
6 to do. I'd left Mr. Appel out of this whole thing and  
7 failed to recognize his appearance.

8 MR. APPEL: Thank you, Mr. Chairman. I'm somewhat  
9 taken by surprise by Mr. Hansen's argument, can't digest  
10 it any more quickly than anyone else, probably at a much  
11 slower rate. But if we are going to move into the  
12 briefing stage or resolution of legal issues, I would  
13 like to know so we can move this matter along. If there  
14 are any other legal issues we're going to be faced with  
15 in the near future -- we had one several months ago and  
16 we spent an amount of time resolving it and now we are  
17 facing another one that I was unaware existed at that  
18 time. And I say that primarily because I represent the  
19 water users down the stream who will suffer if these  
20 violations occur, if other violations occur, because the  
21 resource will be polluted, and we recognize the  
22 administrative procedure has to follow in some course.

23 But let's at least find any other legal conclusions  
24 that must be reached, brief them, and deal with those  
25 issues and get on with it. I thought this would be a

1 fairly simple proceeding, and I was wrong.

2 MR. CARTER: I did as well. But we can't fault  
3 Co-op's counsel advancing novel theories. I think  
4 perhaps what we should do at this point is -- we have  
5 one other item on the regular agenda, and I see folks  
6 here who would like to address the Board on a non-agenda  
7 item, but one before the Board. And I think perhaps  
8 what we should do is pass this matter momentarily, long  
9 enough to finish up our regular agenda, and what I  
10 should do is meet with counsel, and perhaps Mr. Lauriski  
11 and I both will, since we cochaired the last hearing,  
12 and see if we can't come up with an -- essentially a  
13 pre-hearing order; come to an agreement at least on what  
14 the issues are and how to tackle them so we have -- my  
15 concern is that other than Ms. Lever and myself, the  
16 rest of the Board members are not law trained, and this  
17 could be become unmanageable unless we are able to  
18 divide the legal issues into sort of management  
19 bite-size chunks so we can tackle them one at a time and  
20 make determinations. And that will tell us what we need  
21 to do next.

22 MR. HANSEN: I would agree. I submit that under my  
23 reading of the regulations, this is not a mechanical  
24 process for the Board to undertake. Section 331 lays  
25 out the Board's responsibilities, says the Board will



1 issue an order requiring him or -- I'm not reading the  
2 entire statute, I'm skipping words -- issue an order  
3 requiring the permittee to show cause whether his or her  
4 permit to mine may not be suspended or revoked if the  
5 Board determines that a pattern of violation of any of  
6 the requirements of the state program exists; and that  
7 each violation was caused by the permittee willfully or  
8 through unwarranted failure to comply with his  
9 requirements or conditions, and then unwarranted failure  
10 to comply will be based upon demonstration of  
11 negligence.

12 In other words, the Board's obligation is to deal  
13 with the permittee and give them an opportunity to show  
14 cause why his permit should not be revoked, and anything  
15 relevant to that issue should be considered by the  
16 Board.

17 Going on, the Board's previous order relied on  
18 Section 332.300, which we have already discussed.  
19 Didn't reference too much to 332.100. Mr. Mitchell  
20 began reading that section, unfortunately stopped just  
21 when he was getting to the meat of it, as to what the  
22 Division is supposed to do. 332.100 requires the  
23 Division director to look at two or more inspections,  
24 and then consider the circumstances including 332.100,  
25 the number of violations cited on more than one occasion

1 of the same or related requirements of State program of  
2 the permit.

3 The first thing we have to do is consider how many  
4 related violations there are. Secondly, they have to  
5 consider the number of violations cited on more than one  
6 occasion of different requirements of the State program  
7 permit. There is nothing in the record to show they  
8 ever made that consideration. And third, 332.130, the  
9 extent to which the violations were isolated departures  
10 from lawful conduct. There is nothing in the record to  
11 show the Division ever made that determination.

12 MR. MITCHELL: Wrong. Oh, that's in the record.

13 MR. LAURISKI: Let me have a comment here, and Mr.  
14 Richards you may correct me at any point here, but let  
15 me take a stab at this. With respect to the Division, I  
16 would disagree, but with respect to the Board, we did  
17 not reach those issues based upon our findings in the  
18 order which said, in essence, that when Co-op did not  
19 appeal the fact of the violation, the negligence  
20 assigned to the violation or penalties established for  
21 the violation, that became a final order of the Board,  
22 thus estopping Co-op from attacking further the fact or  
23 negligence on the violation. So that narrows the focus  
24 of the hearing to the establishment of a pattern of  
25 violation. Well, to answer the -- it answered the

1 questions asked at its first hearing: Was there two or  
2 more inspections; was there two or more violations  
3 similar in nature. And the Division director determined  
4 that all those had been met, based upon Co-op's failure  
5 to challenge those violations during the times  
6 established, and precluded, in our opinion, Co-op from  
7 going any further on the issue, except to discuss the  
8 severity of the pattern of violations.

9 That's the conclusion that we reached, based upon  
10 failure of Co-op to appeal the violations that were  
11 issued for any of the grounds. And by paying those  
12 violations, that then became a final order of this  
13 Board.

14 MR. CARTER: Let me -- and I understand, I think  
15 that's exactly what we did. But I think the light's  
16 beginning to go on a little bit with regard to Mr.  
17 Hansen's concerns, or his argument. And I think perhaps  
18 at the risk of asking if -- I think we have to ask this,  
19 and perhaps we ought to meet and Mr. Lauriski and I  
20 would meet with counsel with both parties as soon as we  
21 wrap up the regular agenda and, I would ask you to  
22 identify those elements that you believe constitute  
23 breaks in the link of the chain that would otherwise  
24 lead to the determination of a pattern of violations, so  
25 that we can -- I mean, both sides can muster whatever

1 argument or evidence they want to on those points. And  
2 then we can lay them out in an orderly sequence, so that  
3 we're not talking about the things we should talk about  
4 first, last. We cover the first ones first and get to  
5 the next tier and branching it out, and find our way to  
6 the resolution of the issue. And I can't see -- I don't  
7 think there will be any other way to -- I think we need  
8 to lay out a list of the issues, and then address them  
9 one at a time.

10 MR. HANSEN: I think that would be appropriate  
11 because I think the conclusion of the argument I'm  
12 prepared to make, the Board would want to be briefed on  
13 it anyway, because I'm sure Mr. Mitchell has not done  
14 the legal research to respond to my argument.

15 MR. LAURISKI: That's the concern I have. This is  
16 the first time we've heard this argument and so I think  
17 if the parties get together and put all the cards on the  
18 table, we'll know what we're dealing with here in the  
19 interest of getting this resolved.

20 MR. CARTER: I think we want to make a good ruling  
21 based on statutes and regulations.

22 MR. MITCHELL: Right now --

23 MR. HANSEN: I think it would be very helpful  
24 because, among other things, at this stage of the  
25 proceeding, I think that Co-op isn't sure what evidence

1 it is going to be allowed to put on and what evidence it  
2 is not going to be allowed.

3 MR. CARTER: I think a prehearing order makes  
4 sense.

5 MR. MITCHELL: Well, I think we can just recess  
6 this, and let me in the first instance make sure that I  
7 understand what the arguments being made are. I think  
8 I'm beginning to get an idea, and I'm concerned about it  
9 now that I'm beginning to get an idea. But in any case,  
10 once I know where they're going I would then like the  
11 opportunity to have some sort of agreement in front of  
12 the Board as to what will be argued, and I can make a  
13 determination at that time whether I need additional  
14 time to respond to something or whether I believe that  
15 we're prepared to go forward.

16 MR. CARTER: I think that's fair; we need a  
17 prehearing order that lays out what we're going to do  
18 and what order we're going to do it in and make sure  
19 everyone's prepared to do it on that basis. I  
20 understand what your argument is, and I thought this was  
21 clear. I think it's clear to the extent it addresses  
22 the issues that were raised, but I think there are some  
23 new issues that this order --

24 MR. HANSEN: My understanding of the earlier  
25 proceeding was that the only issue that was raised, we

1 have argued and decided on was whether the Co-op mining,  
2 based on the final NOV's, would be estopped from  
3 introducing evidence as to the degree of fault, and that  
4 was the only issue.

5 MR. CARTER: That was the issue that was briefed,  
6 but I think the Board's order is broader, and perhaps  
7 that's an issue that we have to discuss.

8 MR. LAURISKI: That's true, we're going to go back  
9 to the merits. And there's also on the order, a  
10 stipulation that Co-op had admitted, in back of the  
11 violation, admitted to the penalties assessed, and  
12 that's why the Board's order is narrowed to the -- with  
13 respect to the negligence that was assigned to the  
14 violations.

15 MR. CARTER: Well, I'd like to see if we made too  
16 broad an order here, or ruled on issues that weren't  
17 asked to rule on. We need to digest this a bit.

18 So, let's just recess; I think we have some more  
19 time this afternoon and I think we'll be able to make  
20 progress here if not an ultimate resolution. Let's not  
21 anybody leave at this moment. So, let's recess this  
22 matter, and address ourselves to the last item on the  
23 regular agenda.

24 (Whereupon another matter was heard.)

25 MR. CARTER: Let's return to the record now in

1 agenda item Number 4, Docket Number 92-041, Cause No.  
2 ACT/015/025. This is the Co-op matter. As you recall,  
3 we recessed to determine how to proceed with the legal  
4 issues that were being raised. Mr. Appel.

5 MR. APPEL: I'm glad you used the term plural in  
6 hopes to avoid what appeared to be turning into the 12  
7 days of Christmas for legal issues. We've suggested  
8 that perhaps my opposition would file an initial brief,  
9 and 30 days after that Mr. Mitchell and myself, if I  
10 elect to, would respond, and within 15 days after their  
11 response they would have the ability to rebut the  
12 intention of that as to isolate the legal issues to  
13 argue them. Also, to let you know in general what the  
14 evidence would be so that we can determine ahead of time  
15 admissibility, solvency, and you folks will be brought  
16 up to speed for those purposes.

17 Some of the issues appear to be what constitute a  
18 pattern of evidence concerning similar or dissimilar  
19 violations, evidence concerning isolated departures. I  
20 imagine you want to put in damages in the event of  
21 shutdown so they can consider that. And they would  
22 likely have others, but it was the agreement of counsel,  
23 that all this would be presented in this briefing  
24 schedule and we could hopefully shorten the process.

25 MR. CARTER: We had a parallel discussion, in which

1 the Board said well, now what are the issues here. We  
2 came up with a similar list.

3 MR. APPEL: The only big issue I see is what must  
4 the Division do to meet its initial burden of proof?

5 MR. APPEL: Burden of proof was also there.

6 MR. CARTER: All right.

7 MR. APPEL: And I imagine the corollary would be  
8 whether the burden shifts, that sort of inquiry. And  
9 they will raise the issues and we'll respond. If they  
10 think there are other ones, we'll raise those also and  
11 they can deal with that in rebuttal.

12 MS. LEVER: You get 31st days. You get 15 days. And  
13 you get to respond?

14 MR. APPEL: Tom Mitchell wanted 30 days to respond  
15 to my initial 30, 30, 15.

16 MS. LEVER: Okay.

17 MR. HANSEN: Hopefully that should resolve all of  
18 the legal issues.

19 MS. LEVER: Don't we get to do anything?

20 MR. APPEL: You get to have a hearing then.

21 MR. CARTER: We get to rule on this after all. But  
22 I think in light --

23 MR. HANSEN: Unless you want me to rule, I'd be  
24 happy to do that.

25 MR. CARTER: I don't think that's going to work. I



1 think that even though this is prolonging things, I  
2 think that it's important to do it that way so we're  
3 clear about what we're doing because this is, after all,  
4 a case of first impression, and I want to apologize to  
5 all parties involved.

6 I think after our first hearing, I at least felt we  
7 had narrowed the issues to one issue, and that by  
8 briefing and arguing and determining the one issue  
9 relating to the res judicata effect to the NOV, we would  
10 be ready to proceed with evidence, but that I think was  
11 overly simplistic and I now in retrospect wish we had a  
12 more comprehensive decision of all the potential  
13 issues. But I think it's important that we do this and  
14 it sounds like a reasonable way to proceed. Comments or  
15 requests from the Board members?

16 MS. LEVER: Do you need a motion?

17 MR. CARTER: Then we would continue the matter, is  
18 that the appropriate thing to do, counsel for the  
19 Board? We need to renote it, but that's going to  
20 carry us into May. Isn't that right, at least the May  
21 hearing before we would be ready to proceed? So, what  
22 we'll do then is continue the matter until May and adopt  
23 the represented briefing schedule of the parties as the  
24 Board's order and order of continuance. Any other  
25 elements that should be in order?

1 MS. LEVER: Who prepares it?  
2 MR. CARTER: Who wants to prepare this?  
3 MR. HANSEN: Tom asked if I would and I said I would  
4 prepare the order.  
5 MR. CARTER: We'll have you do that and circulate it  
6 for comment. Thank you very much.  
7 MR. APPEL: Thank you.  
8 MR. CARTER: That's it with this matter.  
9 (Whereupon the matter was concluded.)  
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STATE OF UTAH )

COUNTY OF SALT LAKE )

I, Linda J. Smurthwaite, Certified Shorthand Reporter, Registered Professional Reporter, and notary public within and for the county of Salt Lake, State of Utah do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision.

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In Witness Whereof, I have subscribed my name this 4th day of March, 1993.

*Linda J. Smurthwaite*  
LINDA J. SMURTHWAITE  
CERTIFIED SHORTHAND REPORTER

